RECENT DEVELOPMENTS

CONTROL OF MARKETING HOURS DECLARED A MANAGEMENT FUNCTION

Jewel Tea Company v. Associated Food Retailers
331 F.2d 547 (7th Cir. 1964)

Chicago consumers may shop for food in any of more than 9,000 stores, many of which are open until 9 p.m. At 6 p.m., because of an agreement with local butcher unions, the self-service meat counters are closed to all patrons. The sales ban originally included fish and frozen poultry; however, to alleviate a competitive disadvantage vis-a-vis delicatessen stores, defendant now permits fish and poultry to be sold after the 6 p.m. curfew. Plaintiff corporation owns and operates 196 food supermarkets in the Chicago area, the majority of which have self-service meat counters. Industry-wide bargaining with defendant butcher unions is apparently the rule. In 1958, plaintiff agreed to the closing provision, protesting that it did so only under threat of strike, and because it stood virtually alone in opposing the ban. Plaintiff then brought this action for declaratory judgment outlawing the closing hours clause as a restraint of trade under the Sherman Act.[1] Jewel Tea also asked for an injunction and treble damages. Defendant's demurrer was overruled, and the ruling appealed. The Court of Appeals affirmed.[2] On remand, the district court dismissed as to defendant Associated Food Retailers, holding that the evidence did not support a finding that the food retailers had conspired illegally to restrain trade.[3] After all the evidence was in, the district court also dismissed as to the defendant unions. The Court of Appeals for the Seventh Circuit unanimously reversed with a vigorous opinion.[4]

The question is familiar and troublesome: to what extent is labor union activity subject to the antitrust laws? The question involves considerable economic import and vital policy matters. It has historically been a matter of "legal economics," as judges and legislatures have determined how best to distribute economic power between labor and management groups. Early labor organizers met unfriendly courts.[5] When Congress

[1] Sherman Anti-Trust Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-6 (1958).

[2] 274 F.2d 217 (7th Cir. 1960), *cert. denied*, 362 U.S. 936 (1960).

[3] 215 F. Supp. 837 (1962).

[4] 331 F.2d 547 (7th Cir. 1964).

[5] Early union activity was treated as a criminal conspiracy to destroy both the employer's property and competition among workers. See the New York Cordwainer's Case, People v. Melvin, 2 Wheeler Crim. Cas. 262 (1810). When the criminal sanctions were removed, there remained formidable remedies in tort as well as the favorite remedy of employers, the private injunction.

declared that big business trusts were not to be countenanced, the courts did not hesitate to apply the broad language of the Sherman Act to the labor movement as well.[6] This was done despite legislative history tending to exempt the labor unions from the operation of the act.[7] Sections 6 and 20 of the Clayton Act[8] were thought to be labor's emancipation from the Sherman Act, but the courts were quick to dash that notion.[9] It took the unequivocal language of the Norris-LaGuardia Act[10] to provide a measure of immunity from employer's injunction suits.

In the early 1940's the outlines of labor's immunity from antitrust suits began to emerge with *Apex Hosiery Co. v. Leader*[11] and *United*

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[6] *Cf.* Lowe v. Lawler, 208 U.S. 274 (1908).

[7] 21 Cong. Rec. 2457, 2611 (1890), includes the following remark by Senator Sherman:

> I do not think it necessary, but at the same time to avoid any confusion [submit the following to come at the end of the first section] provided, That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of labor or of increasing their wages; nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products.

The motion passed.

[8] Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C. § 17:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

§ 20, 38 Stat. 738 (1914), 29 U.S.C. § 52:

> *No restraining order or injunction shall be granted* by any court of the United States . . . in any case between an employer or employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving . . . a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law. . . . And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do . . . (emphasis supplied.)

[9] The older judges in particular were loath to enforce the new "labor bill of rights." See McCullough, J., in United States v. Dairy Co-op. Ass'n, 49 F. Supp. 475 (D. Ore. 1943). See also Duplex Printing Co. v. Deering, 254 U.S. 443 (1921).

[10] Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 101.

[11] Apex Hosiery v. Leader, 310 U.S. 469 (1940), held that the word "commerce" in the Sherman Act was meant merely to relate the prohibited restraint of trade to interstate commerce for constitutional purposes. *Apex* also held that § 1 of the act made criminal only the common law version of restraint of competition, restraint

States v. Hutcheson.[12] From *Hutcheson* on, it has been settled that unions may control market activities, and the test may be this broad: if the activity is not enjoinable under the Norris-LaGuardia Act, it is impliedly lawful. Then followed *Allen-Bradley Co. v. Local No. 3 IBEW,*[13] which purports to set forth the limit of union antitrust liability. In *Allen-Bradley,* local electrical workers' unions combined with employers to monopolize the New York market in electrical machinery. Foreign manufacturers could easily have competed with the ballooned prices which were an obvious result of the market restraint. The Supreme Court held that the antitrust laws had been violated, and that the conspiracy was not shielded because the unions might have monopolized the labor market acting alone.

Essential to the holding in *Allen-Bradley* was the combination of employee group and employer group. What constitutes such a combination? Some courts have held that unwilling acquiescence alone does not establish the collaboration.[14] Another court asserts that such a combination exists when a non-labor group agrees to a union demand.[15] It was not made clear in the instant case which theory underpins the court of appeals' decision, but the facts of the case do not suggest that Jewel Tea was willing to enter the agreement, nor that all members of the retailers' association were willing to continue what they considered a costly restraint. Yet the better view may require willing agreement between employer groups and union groups to make the *Allen-Bradley* doctrine operative.

Defendant contended that the rule of reason, as announced in *Board of Trade v. United States,*[16] should be applied in the instant case. The test was stated:

> The legality of an agreement or regulation does not depend upon whether or not it restrains competition, but the true test is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes, competition, or whether it is such as may suppress or even destroy competition.[17]

The Court of Appeals rejected this argument[18] saying that *Board of Trade* involved a regulation promotive of competition on balance, whereas no such claim could be made for the marketing hours restriction. The rule of reason need not be read so narrowly. Rather here, it may be read to permit those restraints which neither "suppress" nor "destroy" competition. Not

upon competition in the marketing of goods and services. This brought transportation strikes, previously outlawed, within the labor exemption.

[12] United States v. Hutcheson, 312 U.S. 219 (1941).

[13] 325 U.S. 797 (1945).

[14] See United States v. Bay Area Painters & Decorators Joint Comm., Inc., 49 F. Supp. 733 (D. Cal. 1943).

[15] McHugh v. United States, 230 F.2d 252 (1st Cir. 1956).

[16] 246 U.S. 231 (1918).

[17] *Id.* at 238.

[18] Which the District Court accepted, and upon which, *inter alia,* its determination was made.

only is the rule of reason inapplicable, said the court, but the restriction constitutes a violation of the Sherman Act.

The court further said:

> As long as all rights of employees are recognized . . . by the employer, including the number of hours per day that anyone shall be required to work, any agreement by a labor union, acting in concert with business competitors of the employer, designed to interfere with his operation of a retail business, engaged in handling products in the course of interstate commerce, is a violation of the Sherman Act, and not entitled to the exemption . . . .[19]

Such a broad test is hardly compelled, for it ignores the import of a vast body of labor relations legislation which preserves bargaining rights to both union and management.[20] The unions were surely free to bargain for wages, hours, and conditions of employment and it is at least arguable that they believed they were bargaining over hours in the instant case, since defendants maintained that butchers would be needed to staff even self-service meat counters.

The case makes appropriate the holding in *San Diego Building Trades Council v. Garmon*,[21] which stands for the proposition that whenever sections 7 or 8 of the National Labor Relations Act are arguably involved, both federal and state courts must defer to the original jurisdiction of the NLRB. The agreement under scrutiny here may constitute an illegal agreement under section 8(e), which proscribes agreements to cease or refrain from handling the products of any other employer. It may constitute protected employee activity under the broad language of section 7. In either case, the union is entitled to have its position examined by the NLRB if that agency will take jurisdiction. Should the NLRB refuse, then in theory section 14 preserves alternative remedies.

An interesting byproduct of the instant case is the proprietary function doctrine, perhaps referred to more traditionally as management function doctrine. Unions may not bargain in this area, said the court. It does seem that union members are here attempting to "back in" to a position of authority traditionally preserved for managers, and there may be little logic in protecting such usurpation. The conflict of apparently legitimate rights of managers with the newer economic powers in union hands led Archibald Cox to presage the likely result in these terms:

> State courts, moved by hard cases, began to hold that strikes for extraordinarily obnoxious objectives did not give rise to a labor

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[19] Jewel Tea Co. v. Associated Food Retailers of Greater Chicago, Inc., 331 F.2d 547, 549 (1964).

[20] Labor Management Relations Act (Wagner Act), 49 Stat. 449, 29 U.S.C. § 151 (1935); Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 156, 29 U.S.C. § 158 (1947); Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959).

[21] 359 U.S. 236 (1959).

> dispute within the local anti-injunction laws, and finding no place to stop, ended by reading the full common law objectives test back into statutes intended to abolish it . . . The suggested approach would necessarily lead to a new objectives test *phrased in the language of management functions* as opposed to terms and conditions on which employees may properly bargain, i.e., it would remove from the immunity of the Norris-LaGuardia Act any labor activity aimed at affecting a "management function" whether or not it is directed toward interference by labor with competition in the product market.[22]

The point is well taken. Here we have a willing seller, and apparently willing buyers, kept apart by the unions for reasons which must seem pale to the layman who wants meat on his evening table. Furthermore, the plaintiff showed by the testimony of a union official that the unions wished to protect the small less competitive butcher shops from supermarket competition, so that each union member might save enough money to open his own shop. Using closing hours to protect one class of retailers against another is not permissible.[23] But can it be categorically stated that unions may never bargain as to marketing hours for any reason whatsoever? Many matters once considered management prerogatives are now routinely bargained upon. Included are the hiring of unneeded men, determining hours of employment, use of labor-saving devices, even the very recognition of labor unions as lawful bargaining agents. The legitimate objects of unions under the Wagner Act[24] have changed,[25] and we may reasonably expect further change. Union bargaining objects may be expanded in the future, since the field is not to be limited to the situation existing at the time the Act was passed.[26] The union objects might conversely be narrowed, but if narrowed through continued judicial use of the antitrust device, a uniform national labor policy will be a likely casualty.

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[22] Cox, "Labor and the Antitrust Laws—A Preliminary Analysis," 104 Pa. L.Rev. 252, 269 (1955).

[23] United States v. Parker Rust Proof Co., 61 F. Supp. 805 (1945).

[24] *Supra* note 20.

[25] Matter of Fieldler, 55 N.L.R.B. 678 (1944).

[26] Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949).